

Testimony of John Lovell on behalf of the California Narcotic Officers Association

Presented Before the Little Hoover Commission
August 23, 2007

Thank you for the opportunity to present the California Narcotic Officers Association's views on the effectiveness of Proposition 36 as a successful treatment strategy, as well as our thoughts as to how treatment outcomes could be more successful.

First, let me tell you a little about CNOA – because I think that background is relevant to your evaluation of the comments we have today. The California Narcotic Officers Association is made up of about 7500 law enforcement professionals who are responsible for enforcing California's controlled substance laws. The organization is primarily a training organization: CNOA conducts over 100,000 hours of POST certified training annually. This makes CNOA the premiere law enforcement training organization in California.

Unlike the other law enforcement organizations you are hearing from, CNOA's membership is overwhelmingly involved in providing front-line, rank and file law enforcement services. Consequently, CNOA has unhappy first-hand experience with the destructiveness of drug crimes. Over 80 names on the Peace Officer Memorial Wall are members of the California Narcotic Officers Association. Included among those 80 names are two past Presidents of the Association, who join the other 80 plus CNOA members who have been killed in the line of duty enforcing California's drug laws.

So much for the notion that there isn't a very real criminal dimension to drug offenses.

Although CNOA was opposed to Proposition 36, we were active participants in the ADP formed Proposition 36 Statewide Advisory Group. CNOA is committed to successful drug treatment, and has been long-time supporters of the Drug Court strategies. Frankly, we were skeptical that Proposition 36, with its lack of accountability and oversight, would be successful, but we were hopeful.

Unhappily, the UCLA studies have borne out our worst fears. In each year of UCLA's evaluations of Proposition 36, the failure rate has been the same – Proposition 36 has an annual failure rate of 75%. To put those numbers in context, the felony recidivism rate in this state is “only” 70%. In other words, the failure rate for Proposition 36 is worse than California's felony recidivism rate – an unacceptable result by any measure.

Sometimes a little bit of history is worth a lot of argument. That history should have given us an important distant early warning of the inevitability of these unacceptably high failure rates.

The political history of Proposition 36 suggests that it never was intended to be a treatment initiative. Instead, Proposition 36 was a rewrite of California's drug laws. It was a sentencing law, not a treatment law. In fact, political reporters who covered the Proposition 36 campaign informed me that there were actually several versions of Proposition 36 – ranging from outright decriminalization of drugs to structured accountability based treatment. The political lore is that the Proposition 36 campaign ran the various versions through focus groups to determine just how much treatment they had to cloak over the initiative to assure its passage. I cannot say with certainty that this was the case – only the Proposition 36 campaign professionals can tell you that, but it certainly explains why Proposition 36 prohibited any use of its funds for drug testing, prohibited any funds being used for in-custody treatment, and prohibited the use of empirically successful “flash incarceration” strategies. In short, the structure of Proposition 36 suggests that it is a decriminalization statute wearing just enough treatment lipstick to pass muster with California voters.

Just as you cannot put lipstick on a pig, evidently it cannot be put on a statute, either; hence the unacceptably high failure rates of Proposition 36.

Of course, we should not be surprised by the treatment unfriendly provisions of Proposition 36; the Drug Policy Alliance's mission is not treatment, but decriminalization. Again, a little history is worth a lot of argument: Last year, Senator Gil Cedillo introduced legislation to provide for a slightly higher sentence for drug dealers who trafficked in close proximity to treatment centers. The Drug Policy Alliance sent their very best lobbyist to testify against the bill. In other words, when the Drug Policy Alliance had to choose between the needs of addicts trying to get clean, and

drug dealers trying to get them to slip, they chose the drug dealers – it's no wonder that Proposition 36 failure rates are as bad as they are!

Please understand that the continual 75% failure rates are more than just embarrassingly bad statistics. Each of those failures is the engine for further criminal behavior and resultant human tragedy. The failure of a Proposition 36 client has a societal ripple effect that includes many, many non-drug users. We had a most pointed example of the consequence of a Proposition 36 failure within the past two weeks. Recently CHP Officer Scott Russell was murdered when a suspect is alleged to have deliberately run him over. The suspect was just one of the 75% of Proposition 36 clients who failed treatment. It is useless to speculate as to whether Officer Russell would still be alive had Proposition 36 not been enacted.

I am aware that apologists for Proposition 36 continually repeat the mantra that “failure is part of recovery” – but none of us should accept that bromide as a justification. Put simply, policy makers who are asked to provide funding for Proposition 36 have a right to ask for better results; and have a right to make changes in Proposition 36 to obtain better outcomes.

CNOA's criticisms of Proposition 36 should not be interpreted as a criticism of the Department of Alcohol and Drug Programs. That Department has truly done the best job they could given the fact that they have been saddled with a deficient law.

The assumption of voters supporting Proposition 36 was that it would be used to provide treatment to low-level “non-violent” offenders. In fact that has not been the case. Proposition 36 eligibility requirements are written in stone: As a result, serious and violent offenders have been able to participate in Proposition 36 programs. Although some of these offenders do in fact need treatment, it is a prescription for failure to place them in a program that lacks any meaningful oversight or accountability.

The California Narcotic Officers Association believes that a number of changes need to be made to Proposition 36 if it is to be a useful treatment tool.

First, we believe that judges should be given broad latitude to determine who should be admitted into Proposition 36. The current eligibility requirements are simply too rigid and leave no room for judicial

discretion. The court should be able to consider each offender and determine whether they are amenable to treatment, and which treatment model is appropriate.

Second, drug testing should be an integral part of all treatment strategies. Not to put too fine a point on it, but drug users lie. They will tell the treatment provider they are not using – they may even believe it when they say it – but treatment providers (and probation officers) must have the ability to verify the drug user's words with testing.

Third, all levels of treatment must permit the imposition of sanctions, including short-term “flash incarceration” Sanctions are not designed as a criminal justice punishment, but are intended to promote better treatment outcomes. To prohibit sanctions is to leave an important treatment asset on the table.

Flash incarceration is said to be controversial, but it is important to note that it is controversial only with Proposition 36 proponents. The concept enjoys support among treatment professionals, courts and even the defense bar. Moreover, the experience in Hawaii, with the Hawaii Opportunity Probation with Enforcement program (HOPE) is instructive. That program included utilizing sanctions of a few days in jail to motivate compliance and accomplish a major goal that has been set out in Proposition 36 –reduce drug use. Research by Angela Hawken of UCLA and Pepperdine University bears out the success of HOPE: The program resulted in a reduction of missed and dirty drug tests of greater than 80%.

Fourth, judges should have the ultimate sanction – the ability to remove a defendant from a treatment program if the court determines that a defendant is not making appropriate progress. This means that the court could remove a defendant after one failure, or after an infinite number of failures. CNOA trusts the courts to make those determinations. We believe that such judicial discretion is infinitely superior to the rigid one size fits all provisions of Proposition 36. In fact, the rigid system currently in place, which permits three treatment failures, actually enables failure. According to Kevin Smith, Director of the highly successful Zona Seca treatment program in Santa Barbara, “the current structure of Proposition 36 essentially gives permission to the addict to fail, and trust me, as a former addict I can tell you that any addict will take advantage of that permission slip.”

Fifth, funding should not be limited to non-custodial treatment programs. Treatment funding should also be extended to prison-based and jail-based treatment programs.

We believe that these are minimal steps that need to be taken to reconfigure Proposition 36 so that the 75% failure rate can be substantially reduced. A failure to reduce that failure rate will ultimately cause policy makers and the public to lose faith in treatment strategies at all. The UCLA study had one very disquieting finding – namely that Proposition 36 clients were more likely to commit a subsequent felony, misdemeanor or drug offence than a similarly situated cohort of pre-Proposition 36 drug users. If the Proposition 36 failure rate continues at its current level, there is a real possibility that policy makers will seize on this finding as a reason to return to a purely criminal justice approach to drug use.

There is one strategy that is currently being discussed at the state level that CNOA strongly opposes. And that is the effort to simply redefine what constitutes successful completion of treatment. CNOA would counsel against any such redefinition. It is bad enough that Officer Russell was killed by someone who failed Proposition 36; it would be a cruel mockery if a future officer were to be killed by a “grade inflation graduate” of Proposition 36.

As it happens, the Governor and the Legislature have taken action to secure important improvements to Proposition 36. Those improvements, which were enacted in connection with the 2006-2007 Budget, provided for greater judicial discretion in the continuation of clients who had failed, flash incarceration, and emphasized the importance of drug testing. These changes had the support of the treatment community, law enforcement, drug court judges, and the defense bar. They were approved by super majorities in both houses of the Legislature.

Unhappily, upon their being signed into law by the Governor, some of the original proponents of Proposition 36 enjoined their implementation pending a judicial determination of their constitutionality. In addition to making legislative recommendations, one other avenue of action by the Little Hoover Commission could be to file an amicus brief with the court in support of those needed reforms.

The California Narcotic Officers Association is committed to successful treatment; we believe it is time for policy makers to join in that commitment and to break the continuous cycle of apology for the failures of Proposition 36.

